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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 832

STATE OF OKLAHOMA EX REL. LEON C. PHILIPS, GOVERNOR OF THE STATE OF OKLAHOMA, APPELLANT,

vs.

GUY F. ATKINSON COMPANY, CLEON A. SUMMERS, UNITED STATES ATTORNEY FOR THE EASTERN DISTRICT OF OKLAHOMA, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF OKLAHOMA

FILED MARCH 11, 1941

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[fol. a]

[Caption omitted]

[fol. 1]

**IN DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF OKLAHOMA**

Civil Action No. 348

THE STATE OF OKLAHOMA UPON THE RELATION OF LEON C.
PHILLIPS, Governor of the State of Oklahoma, Plaintiff,

vs.

GUY F. ATKINSON COMPANY, a Corporation under the Laws
of the State of Nevada; Cleon A. Summers, United States
District Attorney for the Eastern District of Oklahoma,
and Curtis P. Harris, Special Attorney Department of
Justice of the United States, Defendants.

COMPLAINT—Filed September 6, 1940

Plaintiff, the State of Oklahoma upon the relation of Leon C. Phillips, the duly elected, qualified and acting Governor of said State, brings this, its complaint, against the defendants, Guy F. Atkinson Company, a Corporation under the laws of the State of Nevada; Cleon A. Summers, United States District Attorney for the Eastern District of Oklahoma, and Curtis P. Harris, Special Attorney Department of Justice of the United States, and complains and alleges as follows:

I

That the plaintiff, the State of Oklahoma, is one of the States of the United States of America; that Leon C. Phillips, on whose relation the State of Oklahoma appears herein, is the duly elected, qualified and acting Governor of the State of Oklahoma; that the defendants, Guy F. Atkinson Company, is a corporation organized and existing under and by virtue of the laws of the State of Nevada and is duly authorized to transact business within the State of Oklahoma in accordance with the laws thereof; that Cleon A. Summers is the duly appointed, qualified and acting United States District Attorney for the Eastern District of Oklahoma; that Curtis P. Harris is a resident of the Western District of Oklahoma and has an appointment as

Special Attorney for the Department of Justice of the United States.

That this is a case or controversy of a civil nature between the plaintiff and said defendants, and arises out of [fol. 2] and involves the validity of an Act of Congress of the United States passed and approved on June 28, 1938, being H. R. 10618 (Public No. 761, 75th Congress Chapter 795, 3rd Session) styled:

"An Act authorizing the construction of certain public works on rivers and harbors for flood control, and for other purposes".

That each of said defendants solely and exclusively rely upon said Act of Congress for all matters complained of herein.

That in a certain cause pending in the Supreme Court of the United States styled, State of Oklahoma, complainant, vs. State of Texas, defendant, United States, intervener, 258 U. S. 574, No. 20 Original, decided May 1, 1922, said court settled a controversy then and theretofore existing between the States of Oklahoma and Texas and the United States, with respect to the navigability of Red River as to all matters set forth herein, and with respect to the ownership of the bed of Red River. In said cause it was adjudged and decreed, among other things, that no part of Red River within the State of Oklahoma is navigable. The non-navigability of Red River has remained unaffected since the judgment and decree of said Court as above set forth; and said stream is not now a navigable water of the United States.

That in the case of State of Oklahoma, complainant, vs. State of Texas, defendant, United States, intervener, 260 U. S. 606, No. 18 Original, decided January 15, 1923, said Court settled a controversy then and theretofore existing between the states of Oklahoma and Texas and the United States with respect to the boundary between Oklahoma and Texas. In said cause it was adjudged and decreed, among other things, that the boundary between Oklahoma and Texas, where they are separated by Red River, is along the southern bank of said river. The Court, in said opinion, defines the south bank of Red River in the following language:

"Our conclusion is that the cut bank along the southerly side of the sand bed constitutes the south bank of the river, and that the boundary is on and along that bank at the mean level of the water when it washes the bank without overflowing it." 260 U. S. 636.

Reference is hereby made to the opinions of the Supreme Court of the United States in the above causes, and to the judgments and decrees entered by it therein, and the same are hereby referred to and made a part of this complaint [fol. 3] as if fully set forth herein; that said opinions by said Court, reported as aforesaid, and the judgments and decreed entered pursuant thereto, are final and binding alike upon this complainant, the State of Oklahoma, the State of Texas, and the United States, and said judgments and decrees have been acted upon and accepted by all parties to said suits.

On June 28, 1938, the Congress passed an Act being H. R. 10618 (Public—No. 761—75th Congress, Chapter 795, 3rd Session) styled:

"An act authorizing the construction of certain public works on rivers and harbors for flood control and for other purposes."

A part of said Act refers to the Red River basin being the stream involved in the proceedings referred to in paragraph two hereof. In substance, said Act adopts House Document 541, 75th Congress, 3rd Session, an engineer's report, with such modifications thereof as in the discretion of the Secretary of War and the Chief of Engineers may be advisable, and authorizes and directs the Secretary of War to acquire, in the name of the United States, titles to all lands, easements and rights-of-way necessary for said dam and reservoir project as outlined in said House Document 541; that as outlined in said House Document 541, there is to be constructed at a point some four or five miles northwest of Denison, Texas, and approximately sixteen miles southwest of Durant, Oklahoma, a huge earthen dam some four or five miles in length on and across Red River, by far the greater part of which will be and rest upon Oklahoma soil, and which dam will form a huge reservoir inundating approximately 150,000 acres of land of which

approximately 100,000 acres are located within the State of Oklahoma in the Oklahoma counties of Love, Marshall, Johnston and Bryan; that said dam will impound the waters of Red River and of the Washita River, a tributary of said Red River.

Red River flows in a southeasterly direction and said dam is to be located approximately four miles east or below the mouth of the Washita River, which stream is located entirely within the State of Oklahoma and flows into Red River at a point about two miles above or west of the location of said dam; that said dam, if built as stated, will inundate approximately 100,000 acres of land within the State of Oklahoma the title to which will be taken in the name of the United States; that approximately 3800 acres of said land which will be inundated by said reservoir is owned by plaintiff.

A portion of said land is owned by plaintiff in its sovereign capacity for the use and benefit and for the support and [fol. 4] maintenance of the public or common schools of the State, and a portion of said land is owned by plaintiff for use as a prison farm; that said reservoir will destroy many miles of highways and rights-of-way therefor, belonging to plaintiff; that many bridges belonging to plaintiff will be completely destroyed by said reservoir; that said highways and bridges are devoted to a public use, namely, public travel by the citizens of Oklahoma and other States.

Plaintiff has for many years prior hereto planned, surveyed and built at great monetary cost an integrated and comprehensive system of highways entirely devoted to public use, a part of which system traverses said proposed reservoir both in a northern and southern, and eastern and western direction, and all of said highways and bridges located in said reservoir will be destroyed by the acts and threatened acts of the defendants. Said highways about to be destroyed are strategically located and form vital and important connecting links in the comprehensive and integrated system of State highways owned by plaintiff, the destruction of which will cause plaintiff irreparable injury. That attached hereto and made a part hereof as Exhibit "A" is a true and correct map showing the proposed dam and reservoir; the rivers; and the lands, highways, bridges, subdivisions of government, and boundary of the State of Oklahoma, to be inundated thereby.

That the approximately 100,000 acres of land located within the State of Oklahoma which will be inundated by the reservoir formed by said dam, are principally agricultural lands; that the basin to be inundated is now inhabited by approximately 2000 families, and a total of approximately 8000 people, citizens and residents of plaintiff State; that much of said land is rich soil in a high state of cultivation and is used by the inhabitants thereof for homes and as a means of livelihood; that the lands which will be inundated by said reservoir are, as hereinabove alleged, traversed by many miles of highways; that much of said land has large potential oil reserves and on some of said land there is now located several large producing oil wells, and on some of said land there is now under way extensive drilling and exploration for the production of oil and gas. At this time, by reason of recent oil developments, it — practically certain that at least 15,000 acres of the land to be inundated by the reservoir herein referred to will be, when developed, highly productive of oil and perhaps gas; that [fol. 5] plaintiff derives much of its revenue used for the support of its government, including its university, colleges and eleemosynary institutions from a gross production tax levied on the production of oil and gas; that the taking and inundation of said large acreage of land, from which oil is now and will be produced in large quantities, will cause this plaintiff, as well as its subdivisions of government, a great and irreparable loss in taxable revenues and will seriously interfere with plaintiff in the execution of its governmental functions as one of the States of the American Union; that from recent geophysical and geological surveys, plaintiff believes and, therefore, alleges that at least 50,000 acres of the land to be inundated by the proposed reservoir herein-after described, is underlaid with oil or gas, and that if said reservoir is constructed the same will prevent the production of oil or gas from said land, or at least greatly hinder and obstruct the development to the irreparable damage of plaintiff and its subdivisions of government in the permanent loss of taxable revenues and taxable wealth.

That the annual wealth production accruing to the citizens of plaintiff from the lands which will be inundated from agricultural products is the sum of approximately \$1,500,-

000.00, and in addition said lands produce other large sums of money to plaintiff's citizens who occupy said lands.

The waters of Red River and Washita River are to be impounded as set forth in paragraph 3 hereof, then taken out of plaintiff's domain into the State of Texas, run through conduits located entirely within the State of Texas, and there run through turbines for the generation of electric power for the purpose of sale principally in the area located in and around Dallas and Fort Worth, Texas. The waters thus to be impounded, largely on plaintiff's domain, belong to plaintiff. The taking thereof is without plaintiff's consent and without compensation to it.

That the scheme for said dam and reservoir as projected in said Act and House Document 541 aforesaid, provides for the construction thereof for the purposes of controlling the flood waters of Red River and the Washita River and for the generation of hydroelectric power. Said purposes of flood control and the development of hydroelectric power are under the statutory scheme aforesaid inextricably and inseverably involved. The statutory scheme projects a dam 150 feet in height to spillway elevation, being from tail-[fol. 6] water elevation 510 feet (sea level) to 660 feet. From elevation 510 feet to 590 feet there is to be a dead storage pool for waterpower head. From elevation 595 feet to 620 feet there is to be a water power reservoir. From elevation 620 feet to 660 feet there is to be a flood control reservoir. The flood control reservoir is to be superimposed on the power reservoir, and the power reservoir is to be superimposed on the dead storage reservoir, which dead storage reservoir is to be constructed solely in order to give a head for waterpower. That as set forth in the statutory scheme or authorization act for said project, the first 110 feet in height of the dam is to be used solely and exclusively for the development of waterpower, and the superimposed 40 feet set forth in said statutory scheme is to be used sole-y and exclusively for the impounding and discharge of flood waters; that the statutory purposes for said project are not related to each other except by the

fortuitous circumstance of being at the same location and being purportedly authorized by the same Act.

That as set forth in the statutory scheme or authorization Act, the two purposes for which said reservoir and dam are authorized are functionally separate and neither is the incidental or necessary result of the other; that the waterpower feature of said project is not in aid of or related to the flood control feature thereof except as hereinabove set forth; that the flood control reservoir as projected in said scheme cannot and will not affect the power feature thereof; that the flood control portion of said reservoir can only be used for the impounding and release of flood waters of Red River and Washita River. As set forth in the statutory scheme, the power reservoir will normally be kept full of water. It is no part of said statutory scheme or authorization Act, nor is it physically possible that the same part of the reservoir be used for both flood control and waterpower purposes; that as set forth in the statutory scheme or authorization Act, the waterpower portion of said reservoir is purposefully and separately created at the expense of the utilization for flood control of that part of the reservoir to be used for waterpower.

That as set forth in the authorization Act, the Secretary of War and the Chief of Engineers have power to modify the statutory scheme or plan for said dam and reservoir; that the actual plans for the construction of said dam and reservoir provide for said project to be constructed at the following pool levels:

[fol. 7] 510 feet (sea level) tailwater elevation to 567 feet for dead storage for water head

587 feet to 617 feet for power pool reservoir

617 feet to 640 feet for flood control reservoir

That by reason of the modification of the statutory scheme as aforesaid, said project has been changed from a reservoir inundating 3,400,000 acre-feet for power, and 5,900,000 acre-feet for flood control as provided therein, to one for a reservoir inundating 3,080,000 acre-feet for power, and 2,745,000 acre-feet for flood control. In percentage, as set forth in the statutory scheme and authorization Act, 75% of the height of the dam is for power and 25% for flood control. As the plans for said project have been modified by the defendant and Chief of Engineers, 82% of the height of the

dam is for power, and 18% for flood control. As set forth in the statutory scheme or authorization Act, 37% of the acre-feet inundated is for water storage for power, and 63% for flood control. As the plans have been modified as aforesaid, 53% of the acre-feet inundated is for water storage for power, and 47% for flood control. That by reason of the acts as aforesaid, the statutory scheme or authorization Act has been changed from one preponderantly for flood control to one preponderantly for the development of water power.

Plaintiff further shows to the court that the defendant, Guy F. Atkinson Company, a corporation, purporting to act under a contract with the Secretary of War or the Board of Army Engineers or the Chief of Army Engineers, has now located on the Oklahoma side of the proposed dam as aforesaid a great number of machines consisting of trucks, tractors, steam shovels, drag lines and other equipment for the removal of earth, rock and gravel and is now engaged in the construction of the dam across Red River at the proposed location hereinabove set forth which dam will, when built, be of the height as hereinabove set forth and will impound the waters of Red River and the Washita in the aforesaid reservoir thereby inundating and destroying approximately 100,000 acres of land located within the domain of plaintiff of which approximately 3800 acres are owned by plaintiff in its sovereign capacity as hereinabove alleged; that the building of said reservoir will permanently and totally destroy the lands owned by plaintiff including valuable mineral rights underlying the same for which it has not [fol. 8] received compensation, and will totally and permanently destroy the lands owned by plaintiff's citizens, render impossible or very expensive the development of oil and gas underlying and which is now being produced from a large acreage of said land thereby destroying plaintiff's revenues, and the revenues of its subdivisions of government; that said defendant, Guy F. Atkinson Company solely and exclusively relies for the validity of its contract as aforesaid upon the Act of Congress hereinabove mentioned and set forth.

That the defendant, Cleon A. Summers, United States District Attorney for the Eastern District of Oklahoma, and the defendant, Curtis P. Harris, Assistant to the Depart-

ment of Justice of the United States of America, have already instituted numerous condemnation suits in this court for the purpose of acquiring the title to various tracts of land within the proposed reservoir, and said defendants now propose and intend to institute numerous additional condemnation suits for the purpose of acquiring additional lands in said proposed reservoir, which lands so acquired and which said defendants intend to acquire are located within the domain of plaintiff.

That plaintiff has at no time given its consent to the acts and proposed acts of said defendants but on the contrary has made numerous protests to the Secretary of War having charge of the construction of said dam and reservoir, of which protests and objections said defendants have actual notice.

That as a direct and proximate result of the acts of said defendants in the manner aforesaid plaintiff will suffer irreparable damage and injury substantially as follows:

(a) The taking and inundation of said lands will seriously affect, if not destroy, numerous subdivisions of government of plaintiff in this, to-wit: The land sought to be taken and which will be taken as a result of the acts of said defendants unless enjoined by this Court, is located in the counties of Love, Marshall, Johnston and Bryan which are duly organized and existing counties of plaintiff State.

Within the affected area in said counties are thirty-nine duly and legally organized and existing school districts and townships. Said counties, school districts and townships are supported largely by a levy of advalorem taxes on the real estate and personal property located within the boundaries of such counties, townships and school districts; that [fol. 9] the taking of said approximately 100,000 acres of land will greatly decrease the taxable property in each of the counties aforesaid, and in many of the townships and school districts in each of said counties will virtually take all of the taxable property therefrom that each of said counties, townships and school districts affected have large bond indebtedness, which bonds were issued pursuant to the constitution and laws of plaintiff State; that the bond indebtedness is not a fixed lien on the property of the various subdivisions but is payable from an annual levy of taxes against the taxable property thereof; that if said taxable

property is taken and destroyed by the acts of the defendants as hereinabove set forth, said counties, townships and school districts will be deprived of much of the tax revenue for the support thereof so that in many instances said subdivisions of government will be practically if not entirely destroyed, and as to those not entirely destroyed, the same will be seriously hampered in carrying out the functions of government for which said subdivisions were created. As to many of such subdivisions, if said dam is built and thereby the reservoir is created and said lands inundated, sufficient revenue cannot be obtained to carry on government therein.

That on the basis of 1939 tax levies, the taking of the land alone with no consideration thereof given for the loss of oil revenues, revenues from agriculture and stock raising, other revenues from personal property taxation, the net taxable loss to the subdivisions of government concerned will be approximately \$40,000.00 per year.

(b) That the acts and threatened acts of the defendants in the manner aforesaid are a direct invasion and destruction of the sovereign, quasi sovereign, territorial and proprietary rights of the plaintiff in this, to-wit:

(1) That the construction of said dam will create a huge reservoir of water overflowing and obliterating the present distinguishable banks of Red River. The waters of said reservoir will extend far past the south bank of Red River into the State of Texas, and far north of the north bank of said river into the State of Oklahoma; that the boundary of plaintiff will be obliterated for approximately 40 miles and cannot be determined except perhaps by some method of triangulation and will exist, if at all, only theoretically and not actually. Plaintiff will be compelled to surrender its jurisdiction of the territory to be inundated, and will thereby [fol. 10] be deprived of not only its established boundary but many thousand acres of its best land, which will be in effect a forcible reduction of the area of plaintiff as one of the United States.

(2) That the lands owned by the plaintiff in fee simple will be taken and its proprietary rights therein will be extinguished.

(3) Plaintiff's highways, including the rights-of-way thereof, will be destroyed; its bridges will be destroyed; its means of communication between various sections of Oklahoma will be interrupted and in a large measure destroyed, which highways are of vital importance to plaintiff and its

citizens and form an important part of its integrated and comprehensive system of roads used for the conduct of trade and travel within its borders.

(4) The waters of the Washita and the Red River, owned by plaintiff, will be taken from it in violation of its laws without the payment or offer of just compensation for the taking thereof.

(5) The acts of said defendants will divert the waters of Red River and the Washita into another State for the purpose of being used and appropriated by authorities other than that of plaintiff and those acting under it or by its authority, for the purpose of generating hydroelectric power to be sold on the available market without compensating plaintiff therefor notwithstanding said waters belong to plaintiff.

(6) The approximately 100,000 acres of land located within the boundary of plaintiff to be taken for said project are now thickly populated by the citizens of plaintiff who use the same for homes and as a means of making a livelihood. The taking of said land will oust the citizens of plaintiff therefrom, making it necessary for such citizens to seek other and new homes. The removal of such citizens from said land will create a serious social and economic problem, the burden of which will fall largely upon plaintiff, for which no measure of compensation is afforded or offered.

Plaintiff further shows to the Court that said defendants are without lawful power or authority, under the Act aforesaid, or by virtue of any authority conferred upon them by those who purport to act thereunder, to institute proceedings for the condemnation of land located within the borders of plaintiff including that owned by it, construct said dam for the creation of said reservoir which will destroy its highways, right-of-way therefor and bridges, obliterate its distinguishable boundary, oust its citizens from their homes, [fol. 11] hamper and destroy its subdivisions of government and take from plaintiff its jurisdiction and authority over said property; that said Act of Congress, as same is being applied and as the same is sought to be applied and enforced by the defendants and under which they are acting in the premises aforesaid, and upon which they exclusively and solely rely for their acts, is beyond the power of the

Congress to enact, and is unconstitutional and void in that the same contravenes the rights and powers of plaintiff reserved to it by the Tenth Amendment of the Constitution of the United States; that said project and scheme, as outlined and set forth in said Act and in House Document 541 as aforesaid, are not for a public purpose and are not within the powers of Congress, express or implied, conferred by the Constitution of the United States by Section 8, Article 1, or any other provisions thereof; that said acts and threatened acts of said defendants constitute an unlawful invasion and destruction of the sovereign, quasi sovereign, territorial and proprietary rights of plaintiff reserved to it and protected by the Tenth Amendment of the Constitution of the United States. By reason of the foregoing, said defendants, in their acts and threatened acts in so far as the same invade and destroy the rights of plaintiff as hereinabove alleged, are acting and threatening to act in excess of legal or constitutional authority; notwithstanding which said defendants intend and purpose to, and will, unless enjoined by this Court, commit and perform said illegal and void invasion and destruction of plaintiff's property, domain, boundary and sovereign and quasi sovereign rights. In so doing, said defendants and those for whom they purport to act solely and exclusively rely upon the purported void and unconstitutional Act of Congress aforesaid.

That plaintiff has no plain, complete nor adequate remedy at law for the preservation of its sovereign, quasi sovereign, territorial and proprietary rights which are about to be unlawfully invaded and destroyed by said defendants in the manner aforesaid.

Wherefore, Plaintiff prays:

(1) That the defendant, Guy F. Atkinson Company, a corporation, its agents, servants and employees be permanently restrained and enjoined from:

(a) Constructing any dam across Red River within the domain of plaintiff which would impound the waters of Red River or Washita River in so far as said waters, when impounded, would inundate and destroy any of the lands, highways or bridges belonging to plaintiff or under its jurisdiction and control as a sovereign State, or

(b) Which waters would, if impounded, obliterate, change or interfere in any way with the boundaries of plaintiff.

(2) That defendants, Cleon A. Summers, United States District Attorney, and Curtis P. Harris, Special Assistant Department of Justice of the United States, be enjoined and restrained from instituting or conducting in any court within the State of Oklahoma any suit or proceeding for the condemnation of any lands owned by plaintiff or located within its domain for the purpose of obtaining a site or right-of-way for said dam or the reservoir to be created thereby in so far as said lands sought to be thus acquired are to be used in the construction of the dam and reservoir hereinabove described and set forth and purporting to be authorized by the Act of Congress as aforesaid.

(3) That plaintiff have temporary and such other and further relief special and general as it shall be entitled to receive under the facts alleged and *and* the law applicable thereto.

The State of Oklahoma, Plaintiff, by Mac Q. Williamson, Attorney General of the State of Oklahoma; Randell S. Cobb, First Assistant Attorney General of the State of Oklahoma, State Capitol Building, Oklahoma City, Okla.; C. C. Hatchett, of Durant, Oklahoma; Wm. O. Coe, of Oklahoma City, Oklahoma, of Counsel, 606-608 Braniff Bldg., Attorneys for Plaintiff.

Duly sworn to by Leon C. Phillips, jurat omitted in printing.

[fol. 13] [File endorsement omitted.]

(Here follows 1 photolithograph, side folios 14-19)

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"Exhibit A"

MAP
of
RED RIVER
SHOWING
DENISON DAM AND RESERVOIR

LEGEND

- STATE SCHOOL LAND
- STATE INSTITUTIONAL LAND
- SCHOOL DISTRICTS
- RESERVOIR AT SPILLWAY ELEVATION 640'
- STATE & FEDERAL

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[fol. 20] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed September 30, 1940

Guy F. Atkinson Company, a corporation, Cleon A. Summers, United States Attorney for the Eastern District of Oklahoma, and Curtis P. Harris, Special Attorney of the Department of Justice of the United States, defendants in the above-entitled cause, appearing herein by Norman M. Littell, Assistant Attorney General of the United States, and Charles O. Butler, Attorney, of the Department of Justice of the United States, jointly and severally respectfully move the court as follows:

I

To dismiss this action on the ground that this court is without jurisdiction to proceed with the hearing of this case because; (a) this suit is in reality a suit against the United States of America without its consent; (b) no consent has or can be given by the United States to the institution of this suit; (c) the real controversy herein is between the State of Oklahoma, acting at the relation of its Governor on the one hand, and the United States of America on the other; and (d) the Hon. Henry L. Stimson, Secretary of War of the United States, is a necessary and indispensable party to these proceedings and has not been made a party herein.

II

To dismiss this action because the complaint fails to state a claim against these defendants upon which relief can or should be granted by a court of equity, it appearing from the face of said Complaint; (a) that the Act of Congress challenged as unconstitutional by the plaintiff in these proceedings, and upon which these defendants rely and defend, is, as a matter of Law, a legal, valid, and constitutional enactment of the Congress of the United States, under powers expressly and impliedly conferred and therefore fully sanctioned and warranted by the Constitution of the United States; (b) that these defendants, and each of them, are legally, validly, and constitutionally executing said Act of Congress in the performance of the acts or duties required of these defendants, and each of them, under said Act and under the law; (c) that the alleged injuries to the plaintiff herein are not such injuries as are irreparable nor such in-

juries as are not incidental to the valid, legal, and constitutional execution of said Act of Congress of the United States, nor such injuries as warrant the relief sought by a court of equity; (d) that such alleged injuries are incidental to the exercise of the inherent sovereign right of the United [fol. 21] States to carry into execution a valid, legal, and constitutional enactment of the Congress of the United States, and to institute, maintain, and prosecute eminent domain or condemnation proceedings to acquire all necessary lands, easements, rights-of-way, or property, public or private, in the execution of said Act of Congress; (e) that the plaintiff herein has a plain, complete, and adequate remedy at law whereby to find redress for said alleged injuries, and whereby to protect its alleged sovereign quasi-sovereign territorial and proprietary rights in the premises in readily available, recognized, and well established actions or proceedings at law; (f) that the Act of Congress here involved, and House Document 541, 75th Congress, Third Session, adopted under said Act, are matters of which this court takes judicial notice and have become, by direct reference thereto, a part of the Complaint filed herein, and that said Act and said House Document 541, so enacted by the Congress of the United States, legally, validly, and constitutionally authorizes, warrants, and directs the proper execution thereof, and that it is apparent, from said Complaint, when considered and interpreted in the light of said Act and said House Document 541, that these defendants, and each of them, have committed or performed no act or duty not legally, validly, and constitutionally authorized, warranted, and directed under said Act and said House Document 541.

Wherefore, defendants, and each of them, jointly and severally, move that this action be dismissed.

Norman M. Littell, Asst. Attorney General of United States Department of Justice, Washington, D. C.
Charles O. Butler, Attorney, Department of Justice, Washington, D. C. Cleon A. Summers, United States Attorney, Eastern District of Oklahoma, Muskogee, Oklahoma.

[File endorsement omitted.]

Affidavit of Service

United States of America,
Eastern District of Oklahoma, ss:

Charles O. Butler, of lawful age, being first duly sworn, on oath states that on the 30th day of September, 1940 he served the above, foregoing and attached Motion to Dismiss upon the plaintiffs by mailing a true and correct copy of said Motion to Dismiss to Mac Q. Williamson, Attorney General of the State of Oklahoma, at Oklahoma City, Oklahoma.

Charles O. Butler.

[fol. 22] Subscribed and sworn to before me this 30th day of September, 1940. W. V. McClure, Clerk, U. S. District Court. (Seal.)

[fol. 23] IN UNITED STATES DISTRICT COURT

MINUTES AND ORDERS OF THE COURT MADE AND ENTERED ON
THE 28TH DAY OF OCTOBER, 1940, AT THE HEARING HELD AT
DURANT, OKLAHOMA ON THE MOTION TO DISMISS.

Said cause comes on for oral argument on motion to dismiss of deft., plaintiff appearing by Mr. Randell S. Cobb, Mr. C. C. Hatchett, and Mr. Wm. O. Cope; Deft appearing by Mr. Charles O. Butler, Mr. Finley J. Gibbs and Mr. Cleon A. Summers.

Entered order granting Plff., 10 days from this date within which to file amendment to its complaint if it so desires and directing Defendant to file brief on its Motion to dismiss within 30 days from expiration of time of Plff., for filing amendment and directing Plf., to file its answer brief within 20 days thereafter.

[fol. 24] IN UNITED STATES DISTRICT COURT

AMENDMENT TO COMPLAINT—Filed November 2, 1940

Now, comes the above named plaintiff, leave of Court being first had, and says:

That during the oral argument of the defendants' motion to dismiss had before this Court in Durant, Oklahoma, on

October 28, 1940, the attention of the Court was called to Section 4 of H. R. 9972, 76th Congress, 3rd Session, passed by Congress, and approved by the President on October 17, 1940; that at the time of the filing of this suit said Act had not been passed; that Section 4 of said Act is unconstitutional and void on all the grounds set forth in the Complaint filed herein, the allegations of which are reaffirmed as to said Action 4; that in so far as said Section 4 of said Act attempts to declare the project for the Denison reservoir on Red river in Texas and Oklahoma authorized by the Flood Control Act approved June 28, 1938, to be for the purpose of improving navigation, or regulating the flow of Red river or for other beneficial uses, the same is without factual bases and, in effect, is only a self-serving Congressional declaration; that the project set forth and described in plaintiff's Complaint does not in any way protect or improve the navigable portions of the lower reaches of Red river or of the Mississippi river either by enriching the low water flow of said rivers as the incidental result of the operation of said flood control and hydroelectric power project, except in the intangible, indirect, inconsequential and unsubstantial way set forth and described in House Document 541, 75th Congress, 3rd Session; and that said project so outlined and adopted by Congress has no tangible, direct, immediate or consequential effect either for the improvement of navigation or for regulating the flow of Red river, or for other beneficial uses save and except as set forth and described in the aforesaid statutory scheme; that said Act of Congress does not and cannot effect the findings and decrees set forth in the case of Oklahoma v. Texas, United States, Intervenor, set forth and described in the Complaint.

That the sole and only purposes of said project are those set forth in the Authorization Act and described in the statutory scheme aforesaid for flood control and hydroelectric power, neither of which has any real or substantial relation to the improvement of navigation of the navigable portions of Red river or of the Mississippi river; such inconsequential and intangible benefits to navigation as may result from said project, would flow from this flood control feature thereof and not the hydroelectric feature thereof.

[fol. 25] Wherefore, Plaintiff prays for judgment in accordance with the prayer of its Complaint.

The State of Oklahoma, Plaintiff, By Mac Q. Williamson, Attorney General of the State of Oklahoma; Randell S. Cobb, First Asst. Atty. General of the State of Oklahoma; C. C. Hatchett, of Durant, Oklahoma; Wm. O. Coe, of Oklahoma City, Oklahoma, of Counsel, Attorneys for Plaintiff.

Affidavit of Mailing

State of Oklahoma,
Oklahoma County, ss:

Della Baldwin, being duly sworn upon oath, deposes and says that on the 1st day of November, 1940, she enclosed a copy of the attached Amendment to the Complaint in an envelope addressed to:

Honorable Chas. O. Butler, Assistant Attorney General of the United States, 2127 Lands Division, Department of Justice, Washington, D. C., and to Honorable Cleon A. Summers, United States District Attorney, Washington, D. C.,

with postage thereon fully prepaid, and deposited the same, in the United States post office at the State Capitol, in Oklahoma City, Oklahoma.

Della Baldwin.

Subscribed and sworn to before me this 1st day of November, 1940. Lonnelle Allen, Notary Public.
My commission expires January 7, 1941. (Seal.)

[File endorsement omitted.]

[fol. 26] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed December 7, 1940

Guy F. Atkinson Company, a corporation, Cleon A. Summers, United States Attorney for the Eastern District of Oklahoma, and Curtis P. Harris, Special Attorney of the

Department of Justice of the United States, defendants in the above-entitled cause, appearing herein by Norman M. Littell, Assistant Attorney General of the United States, and Charles O. Butler, Attorney of the Department of Justice of the United States, jointly and severally respectfully move the court as follows:

I.

To dismiss this action on the ground that this court is without jurisdiction to proceed with the hearing of this case because (a) this suit is in reality a suit against the United States of America without its consent, (b) no consent has or can be given by the United States to the institution of this suit, (c) the real controversy herein is between the State of Oklahoma, acting at the relation of its Governor on the one hand and the United States of America on the other, and (d) the Honorable Henry L. Stimson, Secretary of War of the United States, is a necessary and indispensable party to these proceedings and has not been made a party herein.

II.

To dismiss this action because the complaint as amended fails to state a claim against these defendants upon which relief can or should be granted by a court of equity, it appearing from the fact of said complaint as amended: (a) that the Acts of Congress challenged as unconstitutional by the plaintiff in these proceedings, and upon which these defendants rely and defend, are, as a matter of law, legal, valid and constitutional enactments of the Congress of the United States, under powers expressly and impliedly conferred and therefore fully sanctioned and warranted by the Constitution of the United States; (b) that these defendants, and each of them, are legally, validly and constitutionally executing said Acts of Congress in the performance of the acts or duties required of these defendants, and each of them, under said Acts and under the law; (c) that the alleged injuries to the plaintiff herein are not such injuries as are irreparable nor such injuries as are not incidental to the valid, legal and constitutional execution of said Acts of Congress of the United States, nor such injuries as warrant the relief sought by a court of equity; (d) that such alleged injuries are incidental to the exercise

[fol. 27] of the inherent sovereign right of the United States to carry into execution a valid, legal and constitutional enactment of the Congress of the United States, and to institute, maintain and prosecute eminent domain or condemnation proceedings to acquire all necessary lands, easements, rights of way, or property, public or private, in the execution of said Acts of Congress; (e) that the plaintiff herein has a plain, complete and adequate remedy at law whereby to find redress for said alleged injuries, and whereby to protect its alleged sovereign, quasi-sovereign, territorial and proprietary rights in the premises in readily available, recognized, and well established actions or proceedings at law; (f) that the Acts of Congress here involved, and House Document 541, 75th Congress., 3d Sess., adopted under said Acts, as modified and amended, are matters of which this court takes judicial notice and have become, by direct reference thereto, a part of the complaint filed herein, as amended, and that said Acts and said House Document 541, as modified and amended, so enacted by the Congress of the United States, legally, validly and constitutionally authorize, warrant and direct the proper execution thereof, and that it is apparent, from said complaint, as amended, when considered and interpreted in the light of said Acts and said House Document 541, as modified and amended, that these defendants, and each of them, have committed or performed no act or duty not legally, validly and constitutionally authorized, warranted and directed under said Acts and said House Document 541, as modified and amended.

Wherefore, defendants, and each of them, jointly and severally, move that this action be dismissed.

Norman M. Littell, Assistant Attorney General of the United States, Department of Justice, Washington, D. C. Charles O. Butler, Attorney, Department of Justice, Washington, D. C.

Cleon A. Summers, United States Attorney, Eastern District of Oklahoma, Muskogee, Oklahoma.

[File endorsement omitted.]

[fol. 28] PROOF OF SERVICE OR COPY OF MOTIONS TO DISMISS

Charles O. Butler upon being first duly sworn, deposes and says that he served a true and correct copy of the

Motions to Dismiss of the defendants in the above-entitled cause upon Mac Q. Williamson, Attorney General of the State of Oklahoma; C. C. Hatchett of Durant, Oklahoma; and William O. Coe of Oklahoma City, of counsel for the plaintiff in said cause, by depositing said copy of said motions in the United States Post Office, postage prepaid, at Muskogee, Oklahoma, directed to said counsel at their respective addresses appearing from the records in said case.

Charles O. Butler.

Subscribed and sworn to before me this 9th day of December, A. D. 1940. W. V. McClure, Clerk of the United States District Court for the Eastern District of Oklahoma. By Ellis Quiett, Deputy.
(Seal.)

[File endorsement omitted.]

6 [fol. 29] IN UNITED STATES DISTRICT COURT

Before Huxman and Murrah, Circuit Judges, and Rice,
District Judge

MEMORANDUM OPINION—Filed February 8, 1941

RICE, District Judge:

By this action the State of Oklahoma, upon the relation of Leon C. Phillips, Governor, challenges the right of the defendants to proceed with the construction of what is commonly known as the Denison Dam. The dam is now in the process of construction across Red River near Denison, Texas, and from a point in Bryan County, Oklahoma. The defendant, Guy F. Atkinson Company, a corporation, is the contractor and it is charged in the bill of complaint that he is purporting to act under a contract with the Secretary of War. The defendant, Cleon A. Summers, is the United States District Attorney for the Eastern District of Oklahoma. Curtis P. Harris, defendant, is a Special Attorney for the Department of Justice of the United States. As to the latter two defendants, it is charged that they have already instituted numerous suits for the condemnation of lands within the proposed area of the dam, and, unless

enjoined, will institute other suits for the condemnation of lands within the State of Oklahoma. The plaintiff further alleges that the defendants are proceeding under a certain act of Congress passed and approved on June 28, 1938, [fol. 30] being H. R. 10618, public No. 761, 75th Congress, chapter 795, 52 Stat. 1215, styled "An Act authorizing the construction of certain public works on rivers and harbors for flood control, and for other purposes", and that this Act of Congress is unconstitutional and void, contravening powers reserved to the plaintiff by the Tenth Amendment; that it is wholly beyond the power of Congress to enact; that the project and scheme as outlined in the Act authorizing its construction and in House Document No. 541 referred to in the Act are not for a public purpose and are not within either the expressed or implied powers of Congress.

Other allegations contained in the plaintiff's bill are that if the dam is constructed as contemplated, it will inundate approximately one hundred thousand acres of lands within the State of Oklahoma, much of which land is owned by the State of Oklahoma in fee simple; that it will destroy many of the highways of the State of Oklahoma; that it will compel eight thousand residents of the State of Oklahoma to move; that it will seriously affect political subdivisions of the State of Oklahoma, both counties and school districts in that much of the lands situated in such subdivisions will be taken; that much of the lands within the area affected are oil producing lands and that the building of the dam will seriously effect the development of these oil lands and will deprive the State of Oklahoma of much revenue to be derived from the gross production tax on the oil and gas that might be produced; and that the impounding of the waters behind said dam would cover lands in both the State of Texas and the State of Oklahoma and would thereby obliterate the boundary line between the two states; that under the plan it is contemplated that waters from both the Red River and the Washita River, a non-navigable tributary of the Red River wholly within the State of Oklahoma, are to be impounded and thereafter conducted through conduits into the State of Texas and there conducted through turbines for the purpose of generating electrical power; that the plan for the construction of said dam as disclosed in House Document 541 contemplates the construction of a dam for both flood control purposes and

for the purpose of the generation of hydroelectric power; that the two purposes are functionally separate and neither [fol. 31] is incidental or a necessary result of the other; that the electric power feature is not in aid of nor related to flood control; that Red River within the State of Oklahoma is a non-navigable stream; that the non-navigability of Red River within the State of Oklahoma was determined by the Supreme Court of the United States in the case of State of Oklahoma, complainant, v. State of Texas, defendant, United States, Intervener, 258 U. S. 574, decided May 1, 1922.

The prayer of the plaintiff's bill of complaint is that the contractor, Guy F. Atkinson Company, its agents, servants and employees be permanently restrained and enjoined from constructing the dam in question and that the defendants, Cleon A. Summers and Curtis P. Harris be enjoined and restrained from instituting and conducting in any court within the State of Oklahoma any suit or proceeding for the condemnation of any lands owned by plaintiff or located within its domain for the purpose of obtaining a site or right-of-way for said dam or the reservoir to be created thereby.

The defendants, represented by the Department of Justice of the United States, have filed a motion to dismiss. This motion to dismiss presents, first, the jurisdiction of the court to entertain this suit, and, second, appropriately raises the constitutionality of the Act of Congress involved. The accepted procedure for presenting this constitutional question — by motion to dismiss. Arizona v. California, 283 U. S. 423; Steward Machine Company v. Davis, 301 U. S. 548; New Jersey v. Sargent, 269 U. S. 328.

At the threshold we are met with the objection to jurisdiction. Defendants contend that the government is the real party in interest, and, its consent not having been given, it may not be sued, and that the Secretary of War is an indispensable party. The immunity of the government from suit, to which it has not consented, is a principle too well established to require citation of authority. Is this a suit against the government? On the face of the pleadings it is not. The plaintiff is proceeding against the individual defendants on the theory that the Act of Congress under which they are admittedly acting is unconstitutional. Although there may be some slight apparent conflict in the decisions, we think it is fairly well estab-

lished that if an agent of the government acts without authority or attempts to act under a void or unconstitutional [fol. 32] Act of Congress, he ceases to act in an official capacity and a suit against him is not a suit against the government, in such case the theory or fiction, if we would call it such, being that the government can act only under constitutional authority. It follows that the exemption of the government from suit does not exempt or protect its officials from being sued when they are proceeding without authority or under an unconstitutional Act of Congress. Otherwise, there would be no constitutional limitations, since there would be no way of testing the constitutionality of the challenged procedure. *Philadelphia Company v. Henry L. Stimson, Secretary of War*, 223 U. S. 605; *Ickes v. Fox*, 300 U. S. 82; *Keifer & Keifer v. Reconstruction Finance Corporation*, 306 U. A. 381; *Ryan v. C. B. & Q. Railroad*, 59 Fed. (2d) 137; *Franklin Township v. Tugwell, Administrator of Resettlement Administration*, 85 Fed. (2d) 208; *United States v. Lee*, 106 U. S. 196.

If the Act of Congress is unconstitutional, then the Secretary of War is not a necessary party. *Colorado v. Toll*, 268 U. S. 228; *Missouri v. Holland*, 252 U. S. 416; *Ryan v. Amazon Petroleum Corporation*, 71 Fed. (2d) 1. In *Colorado v. Toll*, supra, the court says: "The object of the bill is to restrain an individual from doing acts that is alleged he has no authority to do and that derogate from the quasi-sovereign authority of the state. There is no question that a bill in equity is a proper remedy and that it may be pursued against the defendant without joining his superior officers of the United States". It would seem, therefore, that if the Act is unconstitutional, the authorities sustain the right of the state to maintain the action, the appropriateness of injunctive relief, that it is not a suit against the United States, that the Secretary of War is not a necessary party. And, since the Act of Congress in question is challenged by the plaintiff as unconstitutional, and the constitutionality of the said Act is asserted by the defendants, who are within the jurisdiction of this court and have been served by proper process, this court has jurisdiction to entertain the suit and must of necessity determine or pass upon the constitutionality of the Act. The question and the manner in which it is presented, rather than the ultimate answer, determine jurisdiction.

[fol. 33] The motion to dismiss admits all facts well pleaded. It does not admit conclusions of law or deductions of fact not warranted. Most of the allegations of Plaintiff's complaint are immaterial in so far as the constitutionality of the Act in question is involved. Upon oral argument the attorneys for the plaintiff conceded that if the Act of Congress in question is constitutional, the motion of the defendant to dismiss should be sustained. They further admitted that in the determination of the constitutionality of the Act, assuming the truth of all well pleaded allegations, no evidence was necessary or proper. They further admitted upon oral argument and in their brief that if the Act is constitutional, the government may acquire any and all lands by condemnation proceedings, even the lands of the State of Oklahoma, needed in the construction of this project. The sole question therefore, before the court upon this motion to dismiss is whether or not the Act is constitutional.

The contention of the plaintiff is that the construction of this dam has no relation to navigation; that the Act of Congress originally provided for a dam for two purposes, to wit: flood control and hydroelectric purposes; and that the inclusion of the hydroelectric feature rendered the entire Act unconstitutional; that it would not be necessary for the court to pass upon whether or not the dam could be built for flood control purposes, since the inclusion of the hydroelectric feature would in all events render the Act unconstitutional for the reason that the government may not impound the waters of a non-navigable portion of a stream even for a lawful purpose and thereafter use the waters impounded for generating electric power.

The Act of Congress of June 28, 1938, under which the defendants are proceeding is entitled "An Act authorizing the construction of certain public works on rivers and harbors for flood control and for other purposes" 52 Stats. 1215. This is a comprehensive Act dealing with flood control projects in many parts of the United States. The declared purpose of the Act, as contained in Section 4, is "that the following works or improvements for the benefit of navigation and control of destructive floods, and other [fol. 34] purposes, are hereby adopted and authorized * * *". In the original Act, after a statement of general purpose contained in Section 4, with specific reference to the Denison Dam, the following language is used: "The Deni-

son Reservoir on Red River in Texas and Oklahoma, for flood control and other purposes, as described in House Document No. 541, 75th Congress, 3d Session, with such modifications thereof as in the discretion of the Secretary of War and the Chief of Engineers may be advisable, is adopted and authorized at an estimated cost of \$54,000,000.00". By an Act approved October 17, 1940, H. R. 9972, Public No. 868, Chapter 895, 76th Congress, 3d Session, in Section 4 thereof Congress declared: "The project for the Denison Reservoir on Red River in Texas and Oklahoma, authorized by the Flood Control Act approved June 28, 1938, is hereby declared to be for the purpose of improving navigation, regulating the flow of Red River, controlling floods, and for other beneficial uses". This last Act of Congress the plaintiff designated as no more than a self-serving declaration by Congress. This Act was passed by Congress with a full knowledge of the changes made in the plans as described in House Document 541, and may be considered as a ratification of the changes and modifications. It further reaffirmed the purpose of Congress in authorizing the construction of the dam. It might be observed that the declared purpose in the Act of October 17, 1940, is in no substantial particular different from that of Section 4 of the Act of June 28, 1938. It is merely a bit more specific. There is no substantial difference between "benefit of navigation" and the more specific statement "purpose of improving navigation, regulating the flow of Red River". In substance they mean the same. It seems further that the purposes as set forth in Section 4 of the Act of 1938 apply to all of the projects contained in the said Act, even though Congress in making the specific reference to the Denison Dam used the language "for flood control and other purposes". Certainly the Act of October 17, 1940, would remove any doubt that might exist by reason of the use of the particular language in the Act of 1938.

[fol. 35] The plaintiff in this case in effect asks the court to determine that the purposes of the dam are not those that Congress has said them to be. Much time is given in the brief filed herein to a discussion of the evidence before the Congressional committee and to the report contained in House Document 541. The argument is made that in fact this dam will not be an aid to navigation or commerce. While House Document 541, in a summary of the benefits to navigation, contains the statement that present or prospec-

tive commerce on the navigable portion of Red River would not justify the cost involved in the construction of the dam, it states "The construction of the Denison Reservoir would have a favorable effect on open channel navigation by reducing flood stages and increasing low water flows (page 68)". Again on page 72 it is said "In the event that at some future time prospective commerce should justify a navigation system, it is believed such a system would consist of reservoirs operated in conjunction with a series of locks and dams. If this contingency should materialize the proposed Denison Reservoir, located above the navigable portion of the river, would fit into such a general scheme of improvement". House Document 541 discusses flood control, benefits to interstate commerce, and the damaging effect of floods upon interstate commerce; and, after consideration of all the facts before it, Congress enacted the particular legislation for the purposes set forth in the Act itself. It is not for courts to go behind the expressed purpose of an Act of Congress and say that it was not enacted for that purpose as long as the means provided are not unrelated to the expressed objects of the legislation. *Arizona v. California*, 283 U. S. 423; *Aslwander v. T. V. A.*, 297 U. S. 288.

The power of the United States government over waters is not limited to control of navigation. In the recent case of *United States v. Appalachian Electric Power Company*, decided December 16, 1940, the court uses this language. "In our view, it cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. By navigation respondent means no more than operation of boats and improvement of the water-[fol. 36] way itself. In truth the authority of the United States is the regulation of commerce on its waters. Navigability, in the sense just stated, is but a part of this whole. *Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control.*" (Emphasis ours.) It is true that in the Appalachian case, supra, the court determined that the river was in fact navigable. It is well settled, however, that in the exercise of its control the government is not limited in its activity to that portion of a stream which is in fact navigable if the stream in general is a navigable stream, as is the Red River in its lower parts. *United States v. Rio Grande Irrigation Company*, 174 U. S. 690, 703. It is also well settled that the government may construct a

dam and power project on the non-navigable portion of a stream for the purposes of controlling floods in the navigable portions of the stream below the dam. *United States v. Appalachian Electric Power Company*, 107 Fed. (2d) 769, 809; *United States v. Rio Grande Irrigation Company*, 174 U. S. 690; *California Oregon Power Company v. Cement Company*, 295 U. S. 142; *United States v. Utah*, 283 U. S. 64; *United States v. Eighty Acres of Land*, 26 F. Supp. 315 (E. D. Ill.); *Appalachian Electric Power Company v. Smith*, 4 F. Supp. 6 (W. D. Va.).

For years Congress has been legislating on the subject of flood control. Flood control is one of the important methods whereby the navigability of a river is benefited and whereby the government may properly function in its regulation of interstate commerce. This principle is definitely recognized in *United States v. Appalachian Electric Power Company*, supra. We think unquestionably that Congress has said this dam is being constructed for the benefit of navigation and for flood control. In so far as the dam is constructed for either or both of these purposes, the defendants are proceeding under a valid Act of Congress. Congress in thus proceeding does so under its power of regulating and controlling interstate commerce. The power to promote interstate commerce is a general power and Congress may do everything that reasonably relates to that express power. It may deepen the channels of navigable streams, it may undertake flood control projects on such streams, it may build and construct highway bridges across navigable and [fol. 37] non-navigable streams. Its power to prevent floods interfering with interstate commerce is not limited to navigable streams, and it may do anything that is reasonably necessary to prevent the interruption of interstate commerce upon navigable rivers. Flood control improves navigation and is an effective means of controlling, improving and thereby regulating interstate commerce. Having concluded that this legislation is valid under the power of Congress to regulate and control interstate commerce, it is not necessary for this court to pass upon whether or not it might be valid under any other clause of the constitution.

The plaintiff makes much of its argument that the generation of electric power is in no way incidental to flood control. While it may be true that the generation of electricity is not incidental to flood control, it manifestly is true that when the government impounds water behind a dam for purposes

of flood control, there is a vast amount of stored energy which may reasonably be converted into electrical energy. In this potential electrical energy in water impounded behind a dam built for some constitutional purpose by the United States government, the government has a proprietary interest. In the Appalachian case, *supra*, the Court said: "Water power development from dams in navigable streams is, from the public standpoint, a by-product of the general use of the rivers for commerce."

If the Denison Dam were being constructed upon the navigable portion of Red River, if, if the Red River at the point where the dam is being constructed were navigable in fact, it might be assumed that the plaintiff would not question the right of the government to include within the project the hydroelectric feature. It is well settled that the government may build a power project in connection with regulating the navigability of streams. In the *Ashwander* case, *supra*, the Court said: "The government acquired full title to the dam site, with all riparian rights. The power of falling water was an inevitable incident of the construction of the dam, and that water power came into the exclusive control of the federal government. The mechanical energy was converted into electrical energy and the water power, the right to convert it into electrical energy, and the electricity thus produced constitute property belonging to the United States."

[fol. 38] But the Red River at the point where the dam is being constructed has been determined by the Supreme Court of the United States to be non-navigable. Does this fact preclude the government from utilizing the stored energy in the water impounded for the generation of electric power? We think not. The waters to be impounded are flood waters that would pass on without utilization by the State except for the erection of the dam with funds expended by the government. Having created this energy by the expenditure of its funds, the government has a right to utilize it in liquidating the expense of maintaining the structure and in paying the cost of its construction. Since Congress is not limited to the navigable portion of a stream in building a dam for proper purposes, the inclusion of an electric or power project in connection therewith is not prohibited. No case holds that the power part of the project must be in aid of the other purposes or that the manufacture of electricity must be a mere incident to the other purposes.

A proper understanding of the cases leads to the conclusion that as an incident to the construction of a dam for proper purposes the government has the power to connect therewith a project, for making use of the mechanical energy in the stored waters and convert it into electrical energy as a means of liquidating the cost and expense of maintaining the project.

Fundamentally, what plaintiff seeks to have this court declare and determine, is that Congress enacted this legislation for one purpose but declared it to be for another purpose. This would in effect accuse Congress of using a declared purpose as a subterfuge for accomplishing an act not within its power. This court will not assume that Congress determined to invade the sovereign rights of the State of Oklahoma and use its waters for an illegal purpose under the guise of a legal or proper purpose. This court may not inquire into the motives which induced members of Congress to enact the Denison Dam legislation, *Arizona v. California*, *supra*. Congress in passing this legislation had before it House Document 541, and, after consideration of House Document 541 and other evidence before it, reached the conclusion that the Denison Dam would serve the purpose of navigation and flood control. In reaching this conclusion, we cannot say that Congress acted arbitrarily. Since Congress was functioning in the field of its granted constitutional power, there is and can be no invasion of state sovereignty. *United States v. Appalachian Electric Power* [fol. 39] *Company, supra*.

The motion of the defendants to dismiss is sustained. The Attorneys for the defendants will prepare a decree in proper form. This matter is set for entry of such decree at Muskogee on the 8th day of February, 1941, at 10:00 A. M.

[File endorsement omitted.]

[fol. 40] IN UNITED STATES DISTRICT COURT

MINUTES AND RECORD OF PROCEEDINGS AND ORDERS OF THE
COURT OF FEBRUARY 8, 1941

Filing & entering Judgment on dismissal of Hon. Walter A. Huxman, Alfred P. Murrah, U. S. Circuit Judges and Hon. Eugene Rice, U. S. Dist. Judge, sustaining motion of Defts., to dismiss and dismissing said cause and that defts.

recover their costs, to which action of the Court the Plf., excepts for the reasons and on the grounds set forth in the assignment of error which we have and present to the Court and which will presently be filed with the Clerk of this Court.

Filing & entering Order allowing Appeal.

[fol. 41] IN UNITED STATES DISTRICT COURT

JUDGMENT ON DISMISSAL—Filed February 8, 1941

Now on this 28th day of October, 1940, there came on for hearing in open court the motion of the defendants to dismiss this cause of action; the plaintiff appeared by Mac Q. Williamson, Attorney General of the State of Oklahoma, Randell S. Cobb, First Assistant Attorney General of the State of Oklahoma, C. C. Hatchett and William O. Coe; the defendants appeared by Norman M. Littrell, Assistant Attorney General of the United States, and Charles O. Butler, Attorney of the Department of Justice of the United States, and that no other appearances were made. After hearing the arguments of counsel for both plaintiff and defendants, the court directed briefs to be filed in support of and in opposition to said motion to dismiss and took said case under advisement.

Now on this 25th day of January, 1941, the court having had said case under advisement and having considered said motion to dismiss, the briefs of both plaintiff and defendants, and the law of the case, finds said motion to dismiss should in all things be sustained and therefore no injunctive relief should be granted and on this date files herein its memorandum opinion and directs that a decree be entered in accordance therewith on February 8, 1941.

Now on this 8th day of February, 1941, counsel for all parties appeared, and counsel for plaintiff having therupon in open court elected to stand on the complaint and record,

It Is Therefore Ordered, Adjudged and Decreed that the motion of the defendants to dismiss should be and the same is hereby sustained, and that this action be and the same is [fol. 42] hereby dismissed, and the injunction prayed for by the plaintiff be and the same is hereby denied, and that the

defendants go hence without day and that they have and recover their costs herein expended.

Dated this 8th day of February, 1941.

Walter A. Huxman, Alfred P. Murrah, Eugene Rice,
Judge.

[File endorsement omitted.]

[fol. 43] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed February 8, 1941

Comes now the State of Oklahoma upon the relation of Leon C. Phillips, Governor of the State of Oklahoma, plaintiff in the above entitled cause, petitioner herein, and for its petition for appeal, respectfully shows:

I

That on February 8, 1941, an order and judgment was made and entered herein in favor of the defendants, Guy F. Atkinson Company, a corporation, Cleon A. Summers and Curtis P. Harris, dismissing the plaintiff's complaint herein and denying the injunction as prayed for by plaintiff in its said complaint.

II

That said Court, in making and entering said order and judgment committed manifest error to the prejudice of the plaintiff, and plaintiff feeling aggrieved by the making and entering of said order and judgment does hereby appeal therefrom to the United States Supreme Court for the reasons specified in the Assignment of Errors filed herewith and made a part hereof.

III

That there is filed herewith and made a part hereof, a statement as to the jurisdiction of the Supreme Court of the United States as required by Rule 12 of the rules of that Court.

Wherefore, said plaintiff, petitioner herein, prays for the allowance of an appeal from said order and judgment of this Court to the Supreme Court of the United States for the correction of said errors; that the amount of the cost

bond be fixed, conditioned as required by law, and reasonable time be given plaintiff within which to make and file the same; that citation be issued as provided by law, and that a transcript of the record, proceedings and papers upon [fol. 44] which said order and judgment was made, duly authenticated, may be sent to the United States Supreme Court.

The State of Oklahoma, Plaintiff, by Mac Q. Williamson, Attorney General of the State of Okla.; Randall S. Cobb, First Assistant Attorney General of the State of Oklahoma; C. C. Hatchell, of Durant, Wm. O. Coe, of Oklahoma City, Attorneys for Petitioners.

[File endorsement omitted.]

[fol. 45] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed February 8, 1941

Now comes the plaintiff, State of Oklahoma, upon the relation of Leon C. Phillips, Governor of the State of Oklahoma, and hereby makes and files the following assignments of error upon which the plaintiff will rely in the prosecution of its appeal from the order, judgment and decree entered herein on February 8, 1941, dismissing the complaint and denying the injunction, to-wit:

The Court committed manifest error in dismissing plaintiff's complaint and denying the injunction prayed for, for the following reasons:

1. The Court committed error in finding and holding that the Act of Congress approved October 17, 1940, H. R. 9972, Public No. 868, Chapter 895, 76th Congress, 3rd Session, Section 4, was passed by Congress with the full knowledge of the changes made in the plans for the construction of the Denison Reservoir project as described in House Document 541, and in further holding that said Act may be considered as a ratification of the modifications of said project.

2. The Court committed error in finding and holding that Section 4 of the Flood Control Act of June 28, 1938, 52 Stat. 1215, applies to all of the projects contained in said Act, including the Denison Reservoir project, even though Con-

gress, in making the specific reference to the Denison Reservoir, used the language: "For flood control and other purposes."

3. The Court committed error in finding and holding that the plaintiff in this case in effect asked the Court to determine that the purposes of the Denison Reservoir project are not those that Congress has said them to be, and in holding that the Act of Congress declaring this project to be in aid of navigation or commerce, is conclusive on the Court in this case; and in this connection, disregarding the allegations in the complaint and amendment thereto, as well as the findings of the engineers as contained in House Document 541, that the Denison project has no direct or substantial relation to the improvement of navigation.

[fol. 46] 4. The Court committed error in finding and holding that it was without power to give due regard to the true facts and to find and determine the true purpose of the Denison Reservoir project, notwithstanding the expressed or pretended purpose of said project as set forth by Congress in the Act approved June 28, 1938, being H. R. 10618, (Public No. 761, 75th Congress, 3rd Session, Chapter 795, 52 Stat. 1215), styled:

"An Act authorizing the construction of certain public works on rivers and harbors for flood control and for other purposes,"

and the Act of Congress approved October 17, 1940, being H. R. 9972, Public 868, Chapter 895, 76th Congress, 3rd Session.

5. The Court committed error in finding and holding that it is not for the Courts to go behind the expressed purpose of an Act of Congress and say that it was not enacted for that purpose in view of the allegations of the complaint that this project has no substantial relation to or benefit of any public purpose.

6. The Court committed error in finding and holding that the means provided in the Act of Congress authorizing the Denison Reservoir, or dam, are not unrelated to the expressed objects of the legislation.

7. The Court committed error in finding and holding that as applied to the facts alleged in the complaint that the power of the United States government over the waters of

Red River and the Washita is not limited to the control for the purposes of navigation or flood control.

8. The Court committed error in finding and holding that under the allegations of the complaint the United States is not limited in its activity to the control of only the navigable portions of Red River.

9. The Court committed error in finding and holding that the government may construct a dam and power project on a non-navigable portion of a stream for the purposes of controlling floods in the navigable portions of the stream below the dam.

10. The Court committed error in finding and holding that the Denison Reservoir project is, notwithstanding the allegations of the complaint, for the purpose of improving and benefitting navigation and interstate commerce.

[fol. 47] 11. The Court committed error in finding and holding that the Denison Reservoir project reasonably relates to the promotion of interstate commerce.

12. The Court committed error in finding and holding that the legislation for the Denison Reservoir project is valid under the power of Congress to regulate and control interstate commerce.

13. The Court committed error in finding and holding that when the government impounds waters behind the proposed dam for purposes of flood control that it may convert the stored energy thereby created into electrical energy, and that in this potential electrical energy the United States has a proprietary interest.

14. The Court committed error in finding and holding that, contrary to the allegations of the complaint, the power of falling water, in so far as it relates to the Denison Reservoir project, is an inevitable incident of the construction of the dam, and that waterpower thereby created comes into the exclusive control of the Federal Government, and that the electricity thus produced constitutes property belonging to the United States.

15. The Court erred in finding and holding that the government is not precluded from utilizing the stored energy in the water to be impounded by the Denison Reservoir project for the generation of electric power, notwithstanding

ing Red river at the point where the dam is to be constructed has been declared to be non-navigable.

16. The Court committed error in assuming, finding and holding contrary to the allegations of the complaint, that the hydroelectric feature of this project has any relation to the waters which may be impounded for flood control.

17. The Court committed error in assuming, finding and holding that just as much of plaintiff's domain, lands, roads and bridges would be required for a flood control project as one for the dual purpose of flood control and the generation of hydroelectric power.

18. The Court committed error in finding and holding that the power part of the Denison Reservoir project need not be in aid, or a mere incident to, a constitutional purpose.

[fol. 48] 19. The Court committed error in finding and holding that the United States, as an incident to the construction of a dam for proper purposes such as navigation or flood control, has the power to construct therewith an additional structure for making use of the mechanical energy in the stored waters as a means of liquidating the cost and expense of maintaining the property.

20. The Court committed error in finding and holding contrary to the allegations of the complaint, that the plaintiff's contention is to have the Court declare and determine that Congress enacted this legislation for one purpose but declared it to be for another purpose.

21. The Court committed error in disregarding the allegations of the complaint to the effect that the two purposes of this project are unrelated to each other except by the fortuitous circumstance of being authorized in a single act.

22. The Court committed error in disregarding the allegations of plaintiff's complaint that the two purposes of the Act for the Denison Reservoir project are physically separates and neither are related to the other except by the circumstance of being located at the same site and authorized by the same Act.

23. The Court committed error in finding and holding, contrary to the allegations of fact contained in plaintiff's complaint, that Congress did not determine the invasion of

the sovereign rights of the plaintiff to use its waters for an illegal purpose under the guise of a legal or proper purpose.

24. The Court committed error in finding and holding, in disregard of the allegations of the complaint, that Congress was functioning in the field of its granted constitutional power in the Act authorizing the Denison Reservoir project, and that therefore there is and can be no invasion of State sovereignty.

25. The Court committed error in assuming, finding and holding that the United States government owns, or has power or jurisdiction over, the waters of Red river at the site of the proposed Denison Reservoir.

26. The Court committed error in assuming, finding and holding that the United States government owns, or has power or jurisdiction over, the waters of the Washita river at the site of the proposed Denison Reservoir.

[fol. 49] 27. The Court committed error in assuming, finding and holding, contrary to and in disregard of the allegations of fact set forth in the complaint, that the waters of Red river, and the waters of Washita river, would not be utilized by the State of Oklahoma.

28. The Court committed error in finding and holding that the Acts of Congress of June 28, 1938, 52 Stat. 1215, and Section 4 of the Act of Congress approved October 17, 1940, H. R. 9972, Public No. 868, Chapter 895, 76th Congress, 3rd Session, are constitutional in so far as the same relate to the Denison Reservoir project, and are within the express and implied powers of Congress.

29. The Court committed error in assuming, finding and holding that the construction of the Denison Reservoir project by the United States through the acts of the defendants, and the taking of the waters of Red river and the Washita river for that purpose, and the destruction of the States properties, boundaries, roads, highways and bridges, school districts and subdivisions of government, and the destruction of the tax resources of the State of Oklahoma, is not an invasion of the sovereign, quasi sovereign and proprietary rights of the State of Oklahoma, vital to it and reserved and secured to the State of Oklahoma by the Tenth Amendment to the Constitution of the United States.

30. The Court committed error in disregarding the plain, unambiguous and uncontradicted facts alleged in the Bill

of Complaint, and in holding that the Court did not have power and jurisdiction to regard the true facts and base its decision thereon, without regard to the pretended facts as declared by the Acts of Congress of June 28, 1938, 52 Stat. 1215, and of October 17, 1940, H. R. 9972, Public 868, Chapter 895, 76th Congress, 3rd Session, Section 4.

31. The Court committed error in dismissing the Bill of Complaint.

32. The Court committed error in entering its judgment and decree denying the injunction on the record and the complaint.

33. The Court committed error in finding and holding that the use of the waters of the Washita river and the waters of the Red river as they pass through Oklahoma do not constitute the property of the State of Oklahoma, and that the State of Oklahoma does not have the right to appropriate and use the same for such purposes as it deems best, and further committed error in finding and holding that said waters may be diverted by the United States to a point outside of the State of Oklahoma and there used and appropriated for purposes of no benefit to the State of Oklahoma, [fols. 50-60] and against the consent of the State of Oklahoma.

34. The Court committed error in finding and holding that the tax resources of the State of Oklahoma and the waters of the State of Oklahoma, and the highways and bridges of the State of Oklahoma, may be taken for the construction of the Denison Reservoir project without compensation to the State of Oklahoma.

Wherefore, Plaintiff prays that the order, judgment and decree of the Court dismissing the complaint and denying the injunction may be reversed, and the cause remanded to the District Court for further proceedings consistent with the law and as justice may require.

Dated this 8th day of February, 1941.

The State of Oklahoma, Plaintiff, By Mac Q. Williamson, Attorney General of the State of Oklahoma. Randell S. Cobb, First Assistant Attorney General of the State of Oklahoma. C. C. Hatchett, of Durant, Wm. O. Coe of Oklahoma City, Attorneys for Plaintiff.

[File endorsement omitted.]

[fols. 61-63] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed February 8, 1941

The petition of the plaintiff, State of Oklahoma, upon the relation of Leon C. Phillips, Governor of the State of Oklahoma, in the above entitled cause for an appeal to the Supreme Court of the United States from the order, judgment and decree dismissing the complaint and denying the injunction prayed for entered in the above cause on the 8 day of February, 1941, is hereby granted and the appeal is allowed upon said petitioner giving bond according to law in the sum of Five Hundred Dollars, with sufficient sureties conditioned as required by law to pay all costs that may be assessed against said petitioner.

It Is Further Ordered that a transcript of the record, proceedings and papers upon which the order, judgment and decree dismissing the complaint and denying the injunction was made, duly authenticated, be transmitted to the Supreme Court of the United States.

Dated this 8th day of February, 1941.

Eugene Rice, United States District Judge for the Eastern District of Okla. Walter A. Huxman, United States Circuit Judge for the Tenth Circuit. Alfred P. Murrah, United States Circuit Judge for the Tenth Circuit.

[File endorsement omitted.]

[fols. 64-70] Citation in usual form showing service on Norman M. Littell et al. omitted in printing.

[fol. 71] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 72-73] IN SUPREME COURT OF THE UNITED STATES

APPELLANT'S STATEMENT OF POINTS AND DESIGNATION OF PORTIONS OF RECORD ON APPEAL—Filed March 20, 1941

1. Comes now the appellant in the above entitled cause and for its statement of the points on which it intends to rely in its appeal to this Court adopts the points contained in its assignments of error heretofore filed herein.

2. Appellant herein designates process served on the defendants and return of the Marshal on the service thereon,

the affidavit of service on the Attorney General of the United States, appeal bond and praecipe for record as being unnecessary for the consideration of the points herein relied upon. Appellant designates all other portions of the record as being necessary for such consideration.

Mac Q. Williamson, Attorney General of the State of Oklahoma; Randell S. Cobb, First Assistant Attorney General of the State of Oklahoma, Capitol Building, of Oklahoma City, Oklahoma; C. C. Hatchett, Durant, Oklahoma; Wm. O. Coe, Braniff Building, Oklahoma City, Oklahoma, Counsel for Appellant.

[fol. 74] Affidavit of Service of Statement of Points on Which Appellant Intends to Rely, With Designation of Parts of Record Which it Thinks Necessary for the Consideration Thereof

C. C. Hatchett, on his oath, states that he is one of counsel for appellant; that on the 19 day of March, 1941, he mailed a true and correct copy of appellant's statement of points and designation of portions of record on appeal, with the postage thereon prepaid, addressed to the attorneys of record for the appellees, namely, Norman M. Littell, Assistant Attorney General of the United States, Washington, D. C., Charles O. Butler, Attorney Department of Justice, Washington, D. C., Cleon A. Summers, United States District Attorney for the Eastern District of Oklahoma, Muskogee, Oklahoma, and Curtis P. Harris, Special Attorney Department of Justice, Key Building, Oklahoma City, Oklahoma.

C. C. Hatchett.

Subscribed and sworn to before me this March 19, 1941. Mary L. Partaine, Notary Public. My commission expires January 29, 1942. (Seal.)

[fol. 75] [File endorsement omitted.]

Endorsed on Cover: File No. 45,181. Eastern Oklahoma, D. C. U. S. Term No. 832. State of Oklahoma ex rel. Leon C. Phillips, Governor of the State of Oklahoma, Appellant, vs. Guy F. Atkinson Company, Cleon A. Summers, United States Attorney for the Eastern District of Oklahoma, et al. Filed March 11, 1941. Term No. 832 O. T. 1940.

(3632)